Nos. 14-614 & 14-623

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In The
Supreme Court of the United States

W. KEVIN HUGHES, et al.,
Petitioners,
v.
PPL ENERGYPLUS, LLC, et al.,
Respondents.

CPV POWER DEVELOPMENT, INC., et al.,
Petitioners,
v.
PPL ENERGYPLUS, LLC, et al.,
Respondents.

On Writ Of Certiorari To The Fourth Circuit Court Of Appeals

BRIEF OF THE STATES OF CONNECTICUT, IOWA, MAINE, MISSISSIPPI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, PENNSYLVANIA, RHODE ISLAND, VERMONT, THE NEW ENGLAND CONFERENCE OF PUBLIC UTILITIES COMMISSIONERS, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, THE INDIANA UTILITY REGULATORY COMMISSION, THE VERMONT DEPARTMENT OF PUBLIC SERVICE, THE VERMONT PUBLIC SERVICE BOARD, THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, THE MARYLAND OFFICE OF PEOPLE'S COUNSEL AND THE NEW JERSEY DIVISION OF RATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The *amici curiae* are states with a vital interest in the ability to ensure an adequate, diverse supply of electricity and to achieve state renewable energy goals; state public utility commissions that regulate public utilities, including the New England Conference of Public Utilities Commissioners; and state utility consumer advocates who represent the interests of electric customers, including the National Association of State Utility Consumer Advocates. The *amici* are listed in the Addendum to this brief (the "*Amici* States"). The interests of the *Amici* States are threatened by the Fourth Circuit's decision, which incorrectly found the resource procurement efforts of the State of Maryland Public Service Commission ("Maryland") to be field and conflict preempted.

The *Amici* States have an interest in this case because state statutes and state-conducted resource procurement efforts could ultimately be preempted by an extension of the Fourth Circuit's rationale. Thus, their ability to ensure a reliable supply of electricity to their citizens could be severely diminished, impacting not only renewable energy programs or

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[1] This *amici* brief is submitted pursuant to Supreme Court Rules 37.4 (for states represented by their Attorneys General) and 37.3(a) (for state agencies and public advocates). No person other than the named *amici curiae* or their counsel authored this brief or provided financial support for it. A blanket consent for *amici* filings has been filed by petitioners and respondents.

other state environmental programs, but also electric reliability.

SUMMARY OF ARGUMENT

In the decision below, the Fourth Circuit nullified an arms-length, competitively-bid contract between a local public utility and an electric generating company for the construction of new electric generation because the contract required participation in the wholesale energy and capacity markets regulated by the Federal Energy Regulatory Commission ("FERC"), and provided an additional subsidy in excess of the capacity prices recovered in the federal market. Maryland Pet. at App. 1a. The Fourth Circuit held that Maryland's program "functionally" established the rates that Commercial Power Ventures Maryland, LLC ("CPV") received for its capacity sales in the federal capacity auction, and thus under the holding of *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), Maryland's program was field preempted. Maryland Pet. App. at 18a-19a. In numerous ways, the Fourth Circuit's finding of federal field preemption undermines the careful federal-state statutory structure established in the 1935 Federal Power Act

("FPA"), 49 Stat. 847, as amended, codified at 16 U.S.C. § 791a, *et seq.*[2]

Because electricity is and has been an essential service for more than one hundred years, each state acts through its police powers to ensure an adequate, diverse supply of electricity to its citizens. The Fourth Circuit held that when Maryland procured resources to ensure a reliable supply of electricity to its citizens, it entered a field occupied by the federal government. Thus, despite Maryland's historic role with respect to generating facilities in that state, and despite the explicit recognition of the states' duties in the FPA with respect to generating facilities, the court held that Maryland's resource procurement efforts were preempted. It was mistaken.

In *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015), this Court carefully balanced state and federal obligations in the complicated natural gas market to recognize that the obligations could co-exist. Like the Natural Gas Act (15 U.S.C. § 717, *et seq.*), the FPA created a dual sovereignty paradigm where the federal government is responsible for the wholesale energy market, wholesale rates, and interstate commerce and only the states may order the construction of new power-generating facilities.

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[2] The *Amici* States agree with and adopt the Petitioners' conflict preemption argument, and submit this *Amici* brief to elaborate upon their concerns with the field preemption reasoning set forth in the Fourth Circuit's decision.

Contrary to this Court's approach in *Oneok*, the Fourth Circuit applied a broad, sweeping approach to field preemption under the FPA, ignoring congressional intent that states continue to operate in the jurisdictional areas reserved for them.

The unintended impact of the Fourth Circuit's broad field preemption holding is to unsettle and upset the dual sovereignty scheme embodied by the FPA. It has already spawned a series of judicial challenges beyond the specific terms of Maryland's program, raising uncertainty for long-standing state energy procurement efforts to obtain reliable, renewable and diverse energy sources.

The Fourth Circuit's decision implies that if a state has a restructured electricity market or participates in a regional energy market, that state may be limited to the indirect incentives provided by regional markets for the development of new power generating facilities. Nothing in the FPA, or any amendment to the FPA, authorizes or justifies such a limitation. The FPA does not distinguish between restructured and vertically-integrated states, and the Fourth Circuit erred by inserting such a distinction.

The *Amici* States proffer this brief regarding the unintended and potentially far-reaching impact of the Fourth Circuit's field preemption reasoning, as it undermines and calls into question the dual sovereignty balance of state-federal responsibilities provided in the Federal Power Act. Because construction of new electric generating facilities is

expressly and explicitly subject to state regulation under the FPA, the Fourth Circuit's broad preemption decision below must be reversed.

ARGUMENT

I. Contrary to this Court's Recent Holding in *Oneok v. Learjet*, the Fourth Circuit's Decision Improperly Applies a Broad Approach to Field Preemption under the Federal Power Act.

The Fourth Circuit applied a broad and sweeping approach to field preemption of state programs under the FPA. The Fourth Circuit paid little, if any, heed to Maryland's legitimate exercise of its historic powers reserved to it under Section 201 of that law (codified at 16 U.S.C. § 824). Because Maryland acted under its explicit statutory authority and because the Fourth Circuit's approach was directly contrary to this Court's holding in *Oneok v. Learjet*, its field preemption holding must be reversed.

Prior to enactment of the FPA, states possessed extensive regulatory powers over the siting, generation, transmission, distribution and sale of electric energy, though limited by the dormant Commerce Clause. *New York v. FERC*, 535 U.S. 1, 5-6 (2002). See also Maryland Pet. App. at 9a-10a. When Congress enacted the FPA, it divided jurisdictional authority between federal and state governments. Section 201 of the FPA vests FERC with authority

over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The FPA expressly left to the States jurisdiction over "facilities used for the generation of electric energy." *Id.* Indeed, FERC is expressly excluded from jurisdiction over power plants. FERC "shall not have jurisdiction . . . over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). Thus, the FPA, which was enacted in 1935, was probably one of the first statutes demonstrating cooperative federalism.

This Court has long recognized that the FPA took no authority from state commissions; complements and does not usurp state regulatory authority; and throughout, directs FERC to receive and consider the views of state commissions. *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515, 526 (1945). It has also recognized that the Natural Gas Act, "though extending federal regulation, had no purpose or effect to cut down state power." *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507, 517-518 (1947).[3]

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[3] Because the relevant provisions of the Natural Gas Act and the Federal Power Act "are in all material respects substantially identical," this Court cites "interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted).

Thus, the dual sovereignty paradigm has respected the authority reserved to states.

Additionally, FERC itself has recognized that under the FPA the states retain:

> authority in such traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges.

New York v. FERC, 535 U.S. at 24, citing FERC Order 888.[4] States regulated and encouraged new electric generating facilities before the enactment of the FPA, and have continued to routinely regulate and

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[4] FERC Order 888 may be found at *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *clarified*, 79 FERC ¶ 61,182 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

encourage the development of electric generating facilities after the enactment of the FPA.

Consistent with this reserved authority, many, if not all, states conduct some form of either integrated resource planning or long-term procurement planning to meet their residents' energy needs, regardless of whether they have restructured their electricity industry or whether federally-administered capacity markets operate in their region.[5] At least twenty-six non-restructured states formally conduct integrated resource planning.[6] Other states that have partially

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[5] States have "restructured" their electric industries when they introduced competition by requiring their local utilities to divest the function of generating electricity from transmission and distribution, thus permitting competitive supply of retail electric service to customers. For an explanation of the difference between vertically integrated and restructured utilities, see the district court's decision below. Maryland Pet. App. 70a-72a, 103a-107a.

[6] Ariz. Comp. Admin. R. & Regs. R14-2-703; Ark. Admin. Code §§ 126.03.22-1 to 126.03.22-6; 4 Colo. Code Regs. §§ 723-3:3600 to 723-3:3619; Ga. Code Ann. §§ 46-3A-1 to 46-3A-11; *A Proceeding to Require Energy Utilities to Implement Integrated Resource Planning*, Docket No. 6617, 131 P.U.R.4th 535 (Haw. Pub. Serv. Comm'n March 12, 1992); *Re: Idaho Electric Utility Conservation Standards and Practices*, Docket No. U-1500-165, 101 P.U.R.4th 541 (Idaho Pub. Util. Comm'n, Jan. 26, 1989); Title 170 Ind. Admin. Code, r. 4-7-1 to 4-7-9; 807 Ky. Admin. Regs. 5:058; *In re: Development and Implementation of Rule for Integrated Resource Planning for Electric Utilities*, Docket No. R-30021, 2012 WL 1454362 (La. Pub. Serv. Comm'n, April 18, 2012); Minn. Stat. § 216B.2422 (2015); Mo. Code of Regs. tit. 4 § 240-22.060; Mont. Code Ann. §§ 69-3-1201 to 69-3-1206; Neb. Rev. Stat. § 66-1060; Nev. Rev. Stat. § 704.741; N.M. Stat. Ann.

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or fully restructured also conduct integrated resource planning or long-term procurement planning.[7] For example, the California Public Utilities Commission conducts long-term procurement planning and authorizes the state's investor-owned utilities to enter into contracts to construct new generation resources when necessary for reliability. See Cal. Pub. Util. Code § 454.5. Connecticut conducts integrated resource planning, and issues requests for proposals when resource needs are identified. Conn. Gen. Stat. §§ 16a-3a(a), 16a-3b(b). The State of Delaware requires its electric utility to conduct integrated

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1978 § 62-17-10; Title 4 N.C. Admin. Code, r. 11.R8-60; *Re: Montana-Dakota Utilities Company*, Docket No. 10,799, 81 P.U.R.4th 90 (N.D. Pub. Serv. Comm'n, Jan. 27, 1987); Okla. Admin. Code §§ 165:35-37-1 to 165:35-37-4; Or. Admin. R. § 860-027-0400; S.C. Code Ann. § 58-37-40; S.D. Admin. R. 20:10:21:01 to 20:10:21:25; Utah Code Ann. § 54-17-301; Vt. Stat. Ann. tit. 30, § 218c; Va. Code Ann. §§ 56-597 to 56-599; Wash. Rev. Code Ann. § 19.280.030; Ch. 2 Wyo. Code R. § 249.

[7] States that have restructured include, but are not limited to California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas and the District of Columbia. Many, but by no means all, restructured and vertically-integrated states have joined regional energy and capacity markets. Other states, such as California, participate in a regional *energy* market, but its Public Utility Commission conducts resource-planning and authorizes bilateral contracts for new resources needed for reliability or to satisfy state renewable procurement standards. The California PUC also administers year-ahead resource adequacy requirements that are satisfied through bilateral capacity contracts. See, e.g., Cal. Pub. Util. Code § 454.5.

resource planning. Del. Code Ann. Title 26, § 1007(c). The State of Michigan conducts annual investigations into the adequacy and reliability of electric generation capacity. Mich. Comp. Laws Ann. § 460.6s. The State of New Hampshire also conducts integrated resource planning. N.H. Rev. Stat. Ann. § 378:38.

Beyond the states' role in conducting integrated resource planning, states implement renewable energy policies under the powers reserved to them in the FPA.[8] Indeed, well ahead of any efforts to institute national renewable energy requirements, states have led the charge to diversify the resource mix used to serve residents by implementing feed-in tariffs, competitive requests for proposals, and other forms of regulation such as renewable energy portfolio standards.

States unequivocally depend upon their reserved authority in the FPA to ensure reliable, diverse

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[8] See, e.g., Ill. Ann. Stat. ch. 20, para. 3855/1-56 (Illinois Power Agency must run procurements for renewable energy); Md. Code Ann., Public Utilities § 7-704.1 (encouraging long-term contracts with offshore wind farms); Mass. Gen. L. ch. 169, § 83A (electric distribution companies jointly solicit and enter into additional cost-effective, long-term contracts to facilitate the financing of renewable energy generation); N.M. Stat. Ann. 1978 § 62-16-1 (public utility can generate or procure renewable energy at or below reasonable cost); R.I. Gen. Laws § 39-26.1-1 (facilitates long-term contracts between electric distribution companies and renewable energy resources to stabilize long-term energy prices, enhance environmental quality, create jobs in the renewable energy sector and enable financing of renewable energy generation).

electricity for their residents. This authority is critical in order for states to achieve state renewable energy goals. Given the FPA's explicit reservation of the states' jurisdiction over power-generating facilities, the Fourth Circuit should have construed the FPA's "pre-emptive scope narrowly in light of Congress' intent." See *Oneok*, 135 S. Ct. at 1599. "In all pre-emption cases, and particularly in those in which Congress has 'legislated in a field which the states have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Like the Natural Gas Act, the FPA was carefully drawn "with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." See *Oneok*, 135 S. Ct. at 1599, citing *Panhandle Eastern Pipe Line*, 332 U.S. at 517-518. Field preemption must be tempered by Congress' intent that states can continue to operate in the jurisdictional areas reserved for them. *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493, 510-513 (1989).

In *Oneok*, this Court grappled with how field preemption applies when state and federal responsibilities may be interrelated. The *Oneok* Court held the purpose of a state regulation as one of the factors to determine whether a state regulation was

preempted. *Oneok*, 135 S. Ct. at 1599-1600. In holding that state antitrust laws were not preempted, this Court held that the state antitrust lawsuits attacked practices "affecting retail rates—which are firmly on the states' side of that dividing line" between federal and state jurisdiction. *Oneok*, 135 S. Ct. at 1600-1601. The Court confirmed that "FERC's regulation of [a] physical activity for purposes of wholesale rates" did not "foreclose every other form of state regulation that affects those rates." *Oneok*, 135 S. Ct. at 1600. In a similar fashion, the *Northwest Central Pipeline* Court held that state natural gas production laws were not preempted because the state regulation was directed at conserving natural resources and the protection of correlative rights by regulating producers. *Northwest Central Pipeline*, 489 U.S. at 512-514.

Under the *Oneok* standard, the Maryland program is not preempted. The purpose of the Maryland program was to encourage the construction of new power generating facilities, thus ensuring reliable sources of electricity. See Maryland Pet. App. at 64a, 107a-119a (program launched because wholesale markets failed to respond to Maryland's "looming capacity shortage"). Similarly, New Jersey enacted legislation in response to various experts, including regional transmission organization PJM Interconnection, Inc. ("PJM"), warning of possible power outages due to insufficient electric capacity in the region. As stated by the Third Circuit, New Jersey legislation created a state program "to address

state long-term energy needs under a state procurement paid for by state rate payers." *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 254 (3d Cir. 2014), *petitions for cert. pending*, Nos. 14-634 & 14-694 (2015). Maryland's regulation was not directed at setting the rates of FERC's capacity market. It is directed at ensuring adequate electric generating capacity.[9]

Further, Maryland's program required its local electric distribution company to purchase electricity from the successful bidder in a competitive procurement. It epitomizes the classic exercise of state authority over what energy and capacity resources a state utility must purchase, which is squarely within the states' jurisdiction under the FPA. See, e.g., *New York v. FERC*, *supra*, 535 U.S. at 24 (FERC acknowledgment of state authority over utility buy-side decisions). Maryland directed the electric utility to take actions that would increase the amount of electric capacity constructed in the state.

Maryland's regulation did not establish or even direct a rate for wholesale electric capacity. Rather, Maryland required the successful bidder to provide

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[9] The dissent in *Oneok* argued that "what" the state sought to regulate should govern the Court's preemption analysis. *Oneok*, 135 S. Ct. at 1600, 1606. Applying the *Oneok* dissent's rationale, Maryland's program should not have been held to be preempted because Maryland was procuring contracts for long-term energy needs by competitive bids, not directing the wholesale market.

electricity and capacity and participate in the federal markets. Maryland Pet. App. at 118a-119a. Ratepayers, through their electric distribution company, would then pay the successful bidder an amount above and beyond what the bidder captured through the federal market. Maryland Pet. App. at 121a. The bidder would also be obligated to rebate excess dollars collected in the federal market. *Id.* The out-of-market payment served as a more cost-effective means of subsidizing the development of new electric generation facilities.

In its field preemption decision, the Fourth Circuit held that "the principles articulated in *Mississippi Power & Light Co.* apply with equal force in this dispute." Maryland Pet. App. at 20a. Not so. In *Mississippi Power & Light*, FERC had directly ordered a utility to purchase a specific percentage of a particular generator's output. See Maryland Pet. App. at 20a, citing *Mississippi Power & Light*, 487 U.S. at 363. In direct conflict with the federal order, the State of Mississippi insisted that it retained the authority to determine whether the federally-ordered purchases were prudent before the utility could recover the costs of the purchase. *Mississippi Power & Light*, 487 U.S. at 363. As this Court held in *Oneok*, *Mississippi Power & Light* properly is interpreted as a conflict preemption decision, particularly where the state sought to approve or deny the impact from a direct FERC order. *Oneok*, 135 S. Ct. at 1601-1602.

Maryland's program did not directly conflict with the FERC wholesale market.[10] This Court's holding in *Mississippi Power & Light* does not support the Fourth Circuit's overly broad field preemption analysis.

Finally, the Fourth Circuit's field preemption analysis failed to acknowledge that Maryland not only acted within a sphere reserved to it under the FPA, but in an area that Congress foreclosed to FERC. Section 201 specifically provides that FERC "shall not have jurisdiction . . . over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). Because Maryland acted in an area reserved to it and from which FERC is precluded, the Fourth Circuit should have proceeded cautiously, and applied field preemption narrowly. See *Oneok*, 135 S. Ct. at 1599. Indeed, where state actions may raise incidental effects upon a wholesale market, that action should be evaluated under conflict preemption, not field preemption. See, e.g., *Oneok*, 135 S. Ct. at 1601-1602.

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[10] As presented in greater length in Petitioners' briefs, Maryland's program is not conflict preempted. PJM operates its capacity market pursuant to rules reviewed and approved by FERC. These rules required PJM to determine whether any market distortion would result from the capacity auction bids submitted by CPV, the generator selected in Maryland's program. Maryland Pet. App. at 124a-125a. PJM determined that CPV's bid did not distort its market. *Id.* Thus, Maryland's program operated **within** FERC's market, and no conflict preemption exists.

The Fourth Circuit failed to recognize that only the states directly regulate electric generation facilities, an area "firmly on the States' side of [the jurisdictional] dividing line." See *Oneok*, 135 S. Ct. at 1600. Even if Maryland's regulation had an incidental effect on the federal wholesale markets, those same markets evaluated and negated any possible effect. See *Oneok*, 135 S. Ct. at 1601, citing *Northwest Central Pipeline*, 489 U.S. at 514 (state regulation is not preempted "merely because [FERC jurisdictional] rates might be affected."); Maryland Pet. App. at 125a. Maryland's program should not have been held to be field preempted.

II. The Decision Below Threatens States' Abilities to Ensure an Adequate, Diverse Supply of Electricity and to Achieve State Renewable Energy Goals.

The unintended consequence of the Fourth Circuit's broad interpretation of field preemption was to skew and unbalance the careful dual sovereignty structure of cooperative federalism envisioned by the FPA. Because it has spawned numerous jurisdictional attacks on state regulation of electric generating facilities, the Fourth Circuit's decision potentially impacts state-directed contracts and procurements programs beyond the specific terms of the contracts-for-differences required by Maryland's program.

The Fourth Circuit attempted to limit the scope of its decision by stating that it was not ruling on "other state efforts to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ" from the Maryland program. Maryland Pet. App. at 23a.[11] The fact that Maryland could have used other, much less effective means to accomplish its policy goals, however, fails to render its program preempted. It can be argued that there is no practical difference between an electric generating plant receiving a direct subsidy or tax rebate and the same plant receiving an amount above and beyond the capacity auction price from a competitively-awarded bilateral contract. All are in fact direct subsidies, though a contract-for-differences is more cost effective. All provide financial compensation outside

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[11] The Third Circuit offered similar limiting language. See *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 253 n.4 (3d Cir. 2014), *petitions for cert. pending*, Nos. 14-634 & 14-694 (2015) ("permissible means" include subsidies, tax-exempt bonds, tax relief, relaxing of permit approvals, favorable public land leases and gifting of brownfields). The Third Circuit acknowledged the states' concern that "a decision in favor of preemption will hamstring state-led efforts to develop renewable and reliable electric energy resources." *Solomon*, 766 F.3d at 254. Rejecting FERC's argument that any effect on wholesale prices would trigger preemption, the Third Circuit also recognized that "the law of supply-and-demand is not the law of preemption. When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." *Solomon*, 766 F.3d at 255, citing *Northwest Central Pipeline*, 489 U.S. at 514. The Third Circuit nonetheless held the contracts at issue were field preempted.

the wholesale market. Applying the same logic, *arguendo*, if the Maryland program establishes the wholesale market price by providing financial compensation outside of the wholesale market, a direct subsidy or tax rebate arguably could also establish a wholesale market price.[12] The logical flaw underlying the Fourth Circuit's limiting language illuminates the overall logical flaw in the Fourth Circuit's field preemption holding.

The Fourth Circuit (and the Third Circuit) also notably omitted *contracting* in their respective lists of other "permissible means" for states to encourage new generation. This omission, combined with the faulty logic employed by the Fourth Circuit that states set wholesale rates when merely bringing buyers and sellers together in the presence of a federally-administered capacity market, has led to other judicial challenges of long-standing state-directed procurement of electric generating contracts. Plaintiffs now allege field preemption for various state procurement regulatory approvals based merely upon the existence of a federally-administered market.

For example, the Connecticut General Assembly recently passed three statutes to encourage reliable

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[12] The Fourth Circuit's concern that Maryland's program "compromise[d] the integrity of the federal scheme" is belied by FERC's specific determination that CPV's bids complied with its market rules. Maryland Pet. App. at 125a.

electric service and to meet the state's renewable energy goals.[13] These statutes rely upon the state's authority to direct utilities to enter into contracts with renewable energy generators and other clean resources. Electric utilities have entered traditional power purchase agreements with renewable energy generators under Conn. Gen. Stat. § 16a-3f, and the state intends to facilitate more such contracts to reach reliable electric service and renewable energy goals.

Connecticut's implementation of those statutes is being challenged in federal court, however, by energy generators importing the arguments from the Third and Fourth Circuits' decisions. The first of two lawsuits was dismissed by the district court, and the dismissal was affirmed on grounds unrelated to plaintiff's *Nazarian*-based preemption allegation. *Allco Fin. Ltd. v. Klee*, No. 3:13cv1874 (JBA), 2014 WL 7004024, *6-*10 (D. Conn., Dec. 10, 2014) (dismissing case for lack of standing, distinguishing claim from *Nazarian* holding, and rejecting field preemption claim), *affirmed on alternative grounds*, *Allco Fin. Ltd. v. Klee*, 805 F.3d 89 (2d Cir. 2015)

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[13] Conn. Gen. Stat. § 16a-3f (solicitation for sources classified as Connecticut renewable energy); Conn. Gen. Stat. § 16a-3g (solicitation for sources classified as Connecticut renewable energy or large scale hydropower); 2015 Conn. Acts 107 (Reg. Sess.), Sec. 1 (solicitation for resources to provide reliable electric service and to meet the state's energy and environmental goals and policies established in the Integrated Resources Plan).

(affirming dismissal due to lack of exhaustion and lack of standing). The second lawsuit remains pending before the U.S. District Court for the District of Connecticut. Complaint, *Allco Fin. Ltd. v. Klee*, No. 3:15cv608 (CSH) (D. Conn. Apr. 26, 2015), at ¶¶ 41-44 (relying upon the decisions below).

The Rhode Island Public Utilities Commission approved a traditional power purchase agreement between an electric utility and an offshore wind farm. Opponents challenge Rhode Island's regulatory approval in U.S. District Court, alleging field preemption by characterizing state regulation of electric generating facilities as setting wholesale rates. As in Connecticut, opponents cite the decisions below as support. Complaint, *Riggs v. Rhode Island Pub. Serv. Comm'n*, No. 1:15cv00343 (LDA) (D.R.I. Aug. 13, 2015), at ¶ 35.

The New York Public Service Commission approved a term sheet submitted by an electric generating facility and an electric utility under which the generator would retrofit coal-fired units to operate on cleaner natural gas, and authorized rate recovery for the utility. Opponents now challenge New York's regulatory approval in U.S. District Court, alleging field preemption by characterizing state regulation of electric generating facilities as setting wholesale rates. Again, opponents cite the decisions below as support. *Entergy Nuclear Fitzpatrick, LLC v. NY Pub. Serv. Comm'n*, No. 5:15cv230 (N.D.N.Y. Feb. 27, 2015), at ¶ 14.

As these recent, multiple challenges plainly demonstrate, the broad and erroneous preemption rulings below threaten the states' abilities to achieve renewable energy goals and to ensure adequate electric generation for their citizens when federally-administered markets exist.

The states' role in promoting long-term contracts fits squarely within the regulatory structure created by the FPA which is "premised upon contractual agreements voluntarily devised by the regulated companies." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968). This Court has long recognized the important role that long-term contracts have held to ensure reliable energy, and to promote innovative new sources of energy. See *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165, 173-174 (2010) (emphasizing the "essential role of contracts as a key factor fostering stability in the electricity market, to the longrun benefit of consumers"); *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527, 545-548 (2008) (same).

The *Amici* States respectfully request that this Court quash the uncertainty generated by the Fourth Circuit's decision below and unequivocally affirm the critical role of state-directed contracting with generation resources in furtherance of their police powers, by holding that the contracts-for-differences awarded in Maryland's programs are not preempted under the FPA.

III. The Federal Power Act Does Not Distinguish Between Restructured and Vertically-Integrated States, Nor Does it Require States to Rely Solely Upon Federal Wholesale Market Mechanisms to Ensure Reliable Electric Power.

In Section 201, Congress explicitly reserved jurisdictional authority over electric generating facilities to the states. However, while the same Section 201 text applies to all states, the field preemption ruling below may have the effect of applying the FPA differently, depending upon whether a state participates in a federally-administered energy market. Because Congress did not amend Section 201 when federally-administered markets were introduced, there is no basis to conclude that Congress intended for some states to retain jurisdictional authority while others do not.

The federal government's efforts to create competitive wholesale markets are described by the district court below. These efforts began with the Energy Policy Act of 1992 ("EPAct"), Pub. L. No. 102-486, 106 Stat. 2776, and continued with FERC Order No. 888 and FERC Order No. 2000.[14] Maryland

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[14] *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810 (Dec. 20, 1999), FERC Stats. & Regs. ¶ 31,089 (2000), *clarified on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,092 (2000) (codified at 18 C.F.R. § 35.34 (2006), *petitions for review dismissed sub nom. Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607, 614 (D.C. Cir. 2001).

Pet. App. 73a-76a. Congress notably did not amend Section 201 when enacting EPAct in 1992.

FERC Order No. 888 enabled competitive markets for wholesale electric power, including independent regional transmission companies that could facilitate a competitive electric transmission market. See *New York v. FERC*, 535 U.S. at 11-14; *Public Utilities Commission of State of California v. FERC*, 462 F.3d 1027, 1036-1037 (9th Cir. 2006). This, in turn, enabled state legislatures to restructure the provision of retail electric service. *California PUC*, 462 F.3d at 1037. California began its restructuring efforts in 1996. *Id.* Some states followed with their own restructuring efforts in the late 1990s.[15]

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[15] Connecticut, 1998 Conn. Acts 28 (Reg. Sess.), *An Act Concerning Electric Restructuring* (1998); Delaware 72 Del. Laws ch. 10, *Electric Utility Restructuring Act of 1999*, (1999); Illinois, 1997 Ill. Laws 220 ILCS 5/16-101, *et seq.*, *Electric Service Customer Choice and Rate Relief Law of 1997*; District of Columbia, *Retail Electric Competition and Consumer Protection Act of 1999*, D.C. Law 13-107, 47 D.C. Reg. 1091; Maine, 1998 Me. Laws ch. 691, *An Act Relating to Electric Industry Restructuring* (1998); Maryland, 1999 Md. Laws chs. 3-4, *Electric Customer Choice and Competition Act of 1999*; Massachusetts, 1997 Mass. Acts ch. 164, *An Act Relative to Restructuring the Electric Utility Industry in the Commonwealth, Regulating the Provision of Electricity and Other Services, and Promoting Enhanced Consumer Protections Therein* (1997); Michigan, 2000 Mich. Pub. Acts 141, 142, *Customer Choice and Electricity Reliability Act*; New Hampshire, 1996 N.H. Laws ch. 129, *An Act Restructuring the Electric Utility Industry in New Hampshire and Establishing a Legislative Oversight Committee*

(Continued on following page)

Congress again amended the FPA in 2005, well after state restructuring began. The Energy Policy Act of 2005 ("EPAct 2005"), Pub. L. No. 109-58, 119 Stat. 594 (2005), was a broad-ranging legislative effort that amended, *inter alia*, the Natural Gas Act, the Federal Power Act, and the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117, codified at 16 U.S.C. § 2601, *et seq.* Despite the continued development of competitive wholesale markets at the time, and despite state restructuring efforts that had taken place, Congress did not amend Section 201 when enacting EPAct 2005.

The careful allocation between state and federal jurisdiction thus has remained unchanged since the passage of the Federal Power Act in 1935. Nonetheless, the Fourth Circuit held that Maryland's decision to restructure was "necessarily accompanied by a relinquishment" of the state's regulatory authority. Maryland Pet. App. at 13a. Maryland's decision to restructure was not a "relinquishment" of its FPA authority. The Fourth Circuit's field preemption ruling was not based upon any specific

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(1996); New Jersey, 1999 N.J. Laws ch. 23, *Electric Discount and Energy Competition Act* (1999); New York, *Re Competitive Opportunities Regarding Electric Service*, Opinion No. 96-12, 168 P.U.R.4th 515, 525 (N.Y. PSC 1996); Ohio Am. Sub. S.B. No. 3, 148 Ohio Laws, Part IV, 7962 (1999); Pennsylvania, 1996 Pa. Laws 802, No. 138, *Electricity Generation Customer Choice and Competition Act*; Texas, 1999 Tex. Gen. Laws 2543, 2625, *Texas Electric Utility Restructuring Act* (1999).

congressional intent that states lose reserved authority under Section 201 because the states joined a centrally-cleared capacity market. Yet field preemption is fundamentally a question of congressional intent. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Wyeth*, 555 U.S. at 565 ("the purpose of Congress is the ultimate touchstone in every pre-emption case.").

Congress has not expressed an intent for states to lose reserved authority under Section 201 by joining a centrally-cleared capacity market. State jurisdiction is not altered by the mere introduction or presence of a federally-administered capacity market. For example, states objected to a feature of the New England capacity market in which FERC reviewed the Installed Capacity Requirement ("ICR"), or the projected aggregate amount of capacity required for system reliability. *Connecticut Dep't of Public Util. Control v. FERC*, 569 F.3d 477, 480 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1110 (2010). The states questioned whether FERC review of ICR constituted direct regulation of electric generating facilities. *Connecticut DPUC*, 569 F.3d at 479. The D.C. Circuit held that:

> State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as

> regulators of generation facilities without direct interference from the Commission.

Connecticut DPUC, 569 F.3d at 481. The introduction of federally-administered capacity markets did not alter the dual-sovereignty scheme created by the Federal Power Act. However the Fourth Circuit's decision impacts states' authority under Section 201 because of federally-administered capacity markets introduced by FERC, not Congress.

Further, the federal government has only an indirect role in creating electric generating facilities. Neither FERC nor any regional transmission organization can order the construction of a new generating facility. Rather, federally-administered capacity markets merely send price signals to prospective electric generators. If those markets fall short, and insufficient electric generation responds to the wholesale market's price signals, states' citizens will suffer the consequences of reliability shortfalls, such as outages. Under the field preemption scheme imposed by the decisions below, states are deprived of an essential and efficient tool to prevent inadequate investment in electric generation resources. By granting states exclusive jurisdiction over generating facilities, Congress did not intend to leave the nation at the mercy of market price signals as the only means to ensure adequate electric generating facilities.

Similarly, neither FERC nor a regional transmission organization can regulate the fuel

source of an electric generator or expressly require investment in environmentally-friendly, low-carbon emitting resources. Neither FERC nor regional transmission organizations can ensure fuel diversity in electric power generation. Even if wholesale price signals attract new capacity, they cannot ensure states' legitimate interests in fuel diversity will be achieved. Wholesale price signals cannot ensure that state renewable energy goals will be met.

The states did not abdicate their responsibility to ensure energy resource adequacy and diversity when they joined federally-administered capacity markets. The states did not abandon their renewable energy goals when they joined federally-administered capacity markets. The markets were designed to ensure fair and reasonable wholesale rates, and any beneficial impact on encouraging new or renewable electric generating facilities is indirect at best. Nothing in Section 201 requires states to rely solely upon wholesale market mechanisms to ensure adequate, diverse and reliable electric generation.

Because nothing in the Federal Power Act deprives the states of their police powers to ensure adequate, reliable and diverse electricity sources for their residents, the broad, sweeping finding of field preemption by the Fourth Circuit must be rejected.

CONCLUSION

For the reasons set forth above, this Court should reverse the Fourth Circuit decision below.

Respectfully submitted,

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